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No. 91-740

IN THE

Supreme Court of the United States

October Term, 1991

WALTER L. NIXON, JR.

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

SUMMARY OF ARGUMENT

Petitioner's claim may be stated simply: a hearing by a committee of twelve senators does not meet the express constitutional requirement that the Senate "try all Impeachments." U.S. Const., Art. I, § 3, cl. 6. Petitioner is entitled to a judicial determination of this claim.

Respondents and amicus curiae United States Senate [collectively, "respondents"] attempt to trivialize this claim as one concerning mere "evidence-gathering techniques," not a constitutional right central to the separation of powers. Brief for the Respondents and Amicus Curiae United States Senate 39; *accord*, *id.*, at 12, 18, 23, 26, 27 n.25, 29 [hereinafter "Resp. Br."]. But the essence of a "trial" is the "gathering of evidence." The Framers conferred on the Senate the "sole Power to try all Impeachments" because they wanted the "evidence gathering" to take place before that "numerous"

body, even though the effort would be more arduous than "would consist with a reasonable attention to economy."

This conclusion is powerfully reinforced by the historical evidence: the Framers' deliberations, the impeachment practices of the states, and the Senate's own procedures for its first 150 years. Respondents' historical argument skims over that evidence while trumpeting two peripheral points: a sentence written by Thomas Jefferson in 1797 and supposed procedures of the House of Lords in the 1620s. Those historical shards constitute no material evidence at all.

Respondents' justiciability argument also is unsuccessful. Article III extends judicial review to questions arising under the Constitution. That review is particularly important in cases presenting confrontations between coordinate branches of government.

Respondents acknowledge the need for judicial review of a claim based on an "express limitation" in the impeachment clause.[1] They thus wisely distance themselves from the extreme position that judicial review is unavailable even for violations of limitations such as the requirement of a two-thirds majority vote for conviction. *See* Pet. App. A, at 15a (Williams, J.). Respondents' refusal to take such an extreme position is dictated by this Court's holdings, dating from *Marbury v. Madison*, that the separation of powers requires judicial review of a case that "turns on the proper interpretation of the relevant constitutional provisions." *United States Dep't of Commerce v. Montana*, 112 S. Ct. 1415, 1416 (1992).

Because respondents have agreed that a violation of the express limitations of the impeachment clause is reviewable,

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[1] Resp. Br. 26 n.25; Opposition to Petition for Writ of Certiorari 9, 13; *accord* Brief of the Washington Legal Foundation, Congressman James F. Sensenbrenner, Congressman George W. Gekas, and the Allied Educational Foundation as *Amicus Curiae* in Support of Respondents 15 (citing *United States v. Ballin*, 144 U.S. 1, 5 (1892)) [hereinafter "Amici Br."].

justiciability turns on whether a committee hearing violates that text. *See Montana*, 112 S. Ct. at 1416; *INS v. Chadha*, 462 U.S. 919, 940-41 (1983); *Powell v. McCormack*, 395 U.S. 486, 548 (1969). We first address the substantive constitutional issue, and second, justiciability.

ARGUMENT

I. THE CONSTITUTIONAL TEXT AND THE FRAMERS' INTENT

In contending that the constitutional text does not require the Senate to try all impeachments, respondents offer a strained textual construction while largely ignoring the principal historical evidence.

A. The Text Requires Impeachment Trial By The Senate

Respondents admit that the Constitution directs the Senate to act in a "judicial character as a court." *The Federalist* No. 65, at 426 (B. Wright ed. 1961) (A. Hamilton); *see also* Brief of Petitioner 9, 11-12 [hereinafter "Pet. Br."]. Thus, "the Senate" shall "try" all impeachments; each senator, when "sitting" for that purpose, is under oath or affirmation; the accused may not be "convicted" without a two-thirds vote of the senators "present," and may be convicted only for "high Crimes and Misdemeanors"; and the Chief Justice "presides" at presidential impeachments. As respondents concede, "the Framers' expectation that impeachment trials would bear some similarity to judicial trials" is further confirmed by Article III's provision that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Resp. Br. 32 n.32. Respondents contend, however, that the Senate's mandate to "try" impeachments contains no limitation on "how evidence shall be taken." Resp. Br. 12. For them, the term "try" does not restrict the Senate's power to delegate to another body all of the "evidence gathering tasks," which respondents describe as playing a "limited role" in the trial. *Id.*, at 29, 38.

The distinction between the "trial" and the taking of evidence is both artificial and totally without support in the Constitution. The "taking" of evidence is the core of any trial. Denied that function, the "trier" becomes a mere reviewer of the record. To say that the Senate may "try" an impeachment without taking the evidence is to make nonsense of the impeachment trial clause. By that reasoning the Chief Justice could "preside" over presidential impeachments from his chambers in the Supreme Court building simply by sending his executive assistant to occupy the Senate president's chair.

Strikingly, Rule XI acknowledges that the "taking of evidence" is the essence of the "trial": "[N]othing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate *having the entire trial in open Senate*." Pet. Br., App. A, at A2 (emphasis added). Under Rule XI, Nixon's "entire trial" took place before the Rule XI committee.[2]

Respondents attack a straw man when they argue that impeachment trials need not "conform exactly" to court procedure. We challenge the trial before a Rule XI committee, not the evidentiary procedures used by that committee.[3]

Although respondents thus argue that impeachment trials are different from courtroom proceedings, they simultaneously

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[2] Echoing statements by the Senate in this litigation, amici suggest that the Senate could take "congressional notice" of the outcome of prior criminal litigation and dispense entirely with the need for a trial before the Senate. Amici Br. 22 n.3; *see* Pet. Br. 39-40 (citing Senate position). The Senate and amici thus would permit politically motivated criminal prosecutions automatically to achieve removal of the accused from office, contravening the Framers' intent to ensure the "double security" of "a double trial." *The Federalist* No. 65, at 428; *see* Pet. Br. 37.

[3] Notably, respondents appear to take the position that the due process clause governs impeachment trials. Resp. Br. 43 n.49. If so, that clause presumably would constrain any trial procedures used by the Senate.

compare Rule XI committees to special masters who take evidence in civil actions. The analogy does not hold. Under the Seventh Amendment, proceedings before a master are no substitute for a jury trial. The master's findings are simply "admissible as evidence" and "may be read to the jury." Fed. R. Civ. P. 53(e)(3). Thus, the use of masters does not disturb the constitutional right to a jury trial because the parties "remain as free to call, examine, and cross-examine witnesses as if the [master's] report had not been made." *In re Peterson*, 253 U.S. 300, 310-11 (1920).[4] Similarly, magistrates are not authorized to serve as substitutes for juries, or be the sole recipients of evidence in cases for which juries are otherwise required. *See* 28 U.S.C. § 636 (b)(1) (magistrates may conduct hearings on pretrial motions); *id.* §§ 636(a)(3), 636(c) (magistrates may try civil cases and certain misdemeanors, but only with parties' consent); *cf. Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 61-64 (1989) (jury trial required by Seventh Amendment in bankruptcy dispute).[5]

Respondents also argue that the impeachment clause allows the Senate to "judge" guilt or innocence without having seen and heard the evidence, much as each House may "judge" the elections and the qualifications of its members. Art. I, § 5,

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[4] *See also* U.S. Const. amend. VI (guaranteeing that "the accused shall be confronted with the witnesses against him" in a jury trial). In addition, courts have held that issues turning on witness credibility and allegations of fraud are inappropriate for referral to a master. *See, e.g., Bradshaw v. Thompson*, 454 F.2d 75, 80 (6th Cir.), *cert. denied*, 409 U.S. 878 (1972); *In re Watkins*, 271 F.2d 771, 775 (5th Cir. 1959); *see also Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 & n.18 (1962).

[5] The use of masters in original actions before this Court also is inapposite. Resp. Br. 31. Unlike the impeachment trial clause, Article III does not direct this Court to "try" original proceedings, but simply grants original jurisdiction over certain matters. In any event, jury trial would not apply to actions between states or between a state and a citizen seeking equitable relief. *See United States v. Louisiana*, 339 U.S. 699, 706 (1950); *cf.* 28 U.S.C. § 1872 (jury trial specified by Congress in certain original cases).

cl. 1. But the constitutional text refutes this contention. By choosing different words, the Framers distinguished between Congress's function as "judge" of members' elections and qualifications, and the Senate's duty to "try" impeachments. Had the Framers intended the Senate merely to "judge" or "vote" on articles of impeachment, they would have said so.[6]

Respondents finally make the extraordinary statement that Rule XI must be sustained in "[t]he absence of any textual prohibition on the Senate's use of a committee to receive evidence." Resp. Br. 32. By this reasoning, no allocation of a power could be enforced unless the Constitution also specifically prohibited any alternative allocation. Thus, the Seventh Amendment jury trial right would be unenforceable because the Constitution does not prohibit trial by combat; and the House of Representatives would not have exclusive power to initiate revenue bills because the text does not prohibit the Senate from doing so. This novel approach to constitutional interpretation is untenable.

B. The Historical Evidence Overwhelmingly Establishes That The Senate Must Try The Case

Respondents do not dispute the central historical evidence of the Framers' intent:

- That the Framers intended to ensure a deliberative trial to decide whether "to doom to honor or to infamy the most confidential and the most distinguished characters of the community." *The Federalist* No. 65, at 428.

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[6] While the Framers lived, the Senate never used a committee to take evidence in an impeachment trial, but it referred numerous election and expulsion disputes to committees for fact finding. *See Senate Election, Expulsion and Censure Cases from 1789 to 1960*, S. Doc. No. 71, 87th Cong., 2d Sess. (1962). Thus, the Framers and their contemporaries understood that the Senate itself must try impeachments, but that the duty to "judge" under the elections clause requires only that the Senate "make an independent final judgment." *See Roudebush v. Hartke*, 405 U.S. 15, 25 (1972).

- That the Framers rejected streamlined methods such as judicial removal by "address" in favor of impeachment trials of a "judicial character" which provide a "real demonstration of innocence or guilt" on specific charges of wrongdoing. *Id.*, at 426-27.
- That the Senate was chosen to try impeachments because it was a "tribunal more numerous than would consist with a reasonable attention to economy," and would possess the "degree of credit and authority" necessary to resolve impeachment charges brought by the House, the people's "immediate representatives." *Id.*, at 426-28, 430; *The Federalist* No. 79, at 498 (A. Hamilton).
- That the Framers knew state impeachment practices and intended the federal provisions to follow the states' practices, which never included evidentiary committees. *See* Pet. Br. 3-4 & n.1, 7-8 & n.3.
- That the first generation of senators, and all succeeding ones until 1986, insisted that the Senate conduct impeachment trials itself. *See* Pet. Br. 31-32.[7]

Acknowledging this central evidence of the Framers' intent, respondents rummage for support through some dusty corners of history. Respondents concede that English impeachment trials in the House of Lords appear *not* to have involved the use of committees "during the Framers' era." Resp. Br. 35. At least a half dozen English impeachments occurred in the period 1700-1780, and no evidence suggests the use of committees in any of them. *See* 4 J. Hatsell, *Precedents of Proceedings in the House of Commons* 299-314 (1818); Williams, *The*

[7] The first three impeachments, in which Framers participated, are particularly significant. In addition to the seven Framers previously identified as participating in those three impeachments, Pet. Br. 31-32 & n.30, Framers George Read and Gunning Bedford were witnesses in the 1805 trial of Justice Chase. W. Rehnquist, *Grand Inquests, the Historic Impeachments of Justice Samuel Chase and President Andrew Jackson* 91-92 (1992).

Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials, 50 N.Y.U. L. Rev. 512, 531-32 (1975).

Nevertheless, respondents point hopefully to cloudy records suggesting the use of committees in four English impeachments in the 1620s: Field, Bacon, and Mompesson in 1620, and Cranfield in 1624. But the evidence from those impeachments is inconclusive, at best. A leading scholar has concluded that Field's impeachment trial did not involve a committee. *See* C. Tite, *Impeachment and Parliamentary Judicature in Early Stuart England* 226-27 (1974). Mompesson fled before trial and was tried *in absentia* in a proceeding that appears not to have been an impeachment at all. E. Foster, *The House of Lords* 154 (1983).

In Bacon's case, the full House heard evidence: "Witnesses were sworn in the House [of Lords] and examined both in committee *and in the House itself*." *Id.*, at 155 (emphasis added). Bacon thereafter confessed, which "obviated the need for the Lords to use the committee's evidence." Williams, *supra*, at 529. Finally, Cranfield endured a five-day trial before the Lords, "often calling witnesses in his own defence." Tite, *supra*, at 165. In short, there is no confirmed example of an impeachment trial in which the House of Lords delegated the trial to a committee.[8]

Moreover, as respondents now appear to concede, there is no evidence that any of the Framers knew of these ancient and inconclusive precedents. No Framer ever mentioned those supposed precedents or the idea of impeachment trial by com-

[8] To the extent committees were used by the Lords in these cases, they appear to have aided chiefly in investigating allegations and drawing up charges, not in trying the accused. *See, e.g.*, Foster, *supra*, at 153-61 (1983); Tite, *supra*, at 172. In other impeachments during this period, and in all impeachments after 1626, the Lords made no apparent use of committees. *See* Foster, *supra*, at 156-57, 167-72 (1983) (Bennet in 1621 and Strafford in 1640); Tite, *supra*, at 226-27 (Bristol in 1626).

mittee. Nevertheless, respondents suggest gently that such knowledge was "likely," Resp. Br. 35 n.36, because the Framers supposedly could have learned of the early English trials from a well known volume, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors*. *See* Williams, *supra* at 530-31; Resp. Br. 34 n.35. But the editions of that work available to the Framers -- published in 1719, 1730, 1742, and 1776 -- contain no reference to the Field, Mompesson, and Cranfield trials.[9] Only a later edition, published in 1809 and cited anachronistically by respondents, discussed those three cases.[10] It thus remains unclear just how the Framers would have learned this supposed information, which they never mentioned.

Respondents seek to shore up their position by stressing Thomas Jefferson's reference, in his *Manual of Parliamentary Procedure*, to the Lords' early use of committees. Because Jefferson made that reference in 1797, they suggest, his "contemporaries" attending the Philadelphia Convention a decade earlier must have had the same knowledge. Resp. Br. 37. This is most implausible.[11] Jefferson was an exceptionally well read man whose extensive library helped to establish the Library of

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[9] *See A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors* (Hargrave ed. 4th ed. 1776); *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors* (S. Emlyn ed. 3d ed. 1742); *A Complete Collection of State-Trials and Proceedings for High Treason and other Crimes and Misdemeanors* (S. Emlyn ed. 2d ed. 1730); *A Compleat Collection of State-Tryals and Proceedings upon Impeachments for High Treason and other Crimes and Misdemeanors* (Salmon ed. 1st ed. 1719).

[10] 2 *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors* 1116, 1122-23, 1183 (T. Howell ed. 5th ed. 1809).

[11] Jefferson himself may not have become aware of the Lord's use of committees *until* 1797. *See Jefferson's Parliamentary Writings* 43-44 (W. Howell ed. 1988) (impeachment passages likely not added to Jefferson's

Congress.[12] His views of English impeachment practices cannot facilely be "imputed" to the Framers.[13]

In any event, the weight of Jefferson's observation approaches the vanishing point when placed in the context of the Senate's actions during Jefferson's term as Vice-President, when he composed the Manual. As respondents note, the Senate used a committee to take evidence in the 1797 proceeding to expel Sen. William Blount from that body. Resp. Br. 30 n.29; *Senate Election, Expulsion and Censure Cases from 1789 to 1960*, S. Doc. No. 71, 87th Cong., 2d Sess. 3 (1962). As respondents also note, Jefferson had completed the portion of

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Manual until late 1797). Indeed, when Jefferson was preparing to assume the vice presidency in 1797, he wrote to George Wythe of Virginia asking for information on parliamentary practice: "It is now so long since I have acted in the legislative line, that I am entirely rusty in the Parliamentary rules of procedure." IX *Writings of Thomas Jefferson* 370 (A. Lipscomb ed. 1903).

[12] *See generally Thomas Jefferson's Library* (J. Gilreath and D. Wilson eds. 1989).

[13] The lone source cited in Jefferson's Manual for the Lords' use of impeachment committees was Selden's *Judicature of Parliament*. Yet John Adams commented that in 1774 he had the only copy in Boston, or even in America, of that work. Adams also noted Americans' general ignorance of English impeachment precedents. 10 *Works of John Adams* 237-39 (C.F. Adams ed. 1856). Such evidence has led historians to conclude that while the concept of impeachment was born in England, American impeachment practices developed largely independently of the English precedents. *See, e.g.*, P. Hoffer & N. Hull, *Impeachment in America, 1615-1805*, 96-97 (1984).

In fact, during the first federal impeachments, the Americans often criticized those elements of English impeachment procedure of which they had learned. Sen. Jacob Read of South Carolina insisted "that there was no resemblance between the Senate and the House of Lords" in impeachment matters, Aurora General Advertiser, Mar. 1, 1798, p. 2, col. 3, while Sen. Blount's counsel, Framer Jared Ingersoll, found in English impeachment law "little good, and much ill." *Proceedings on the Impeachment of William Blount* 59-62, 67 (J. Gales ed. 1799); *see also* Pet. Br. 5 (Framers' rejection of English method of removing judges by "address").

his Manual that mentions the Lords' use of committees "by the time of the Blount impeachment in 1798 and provided a copy to the Senate committee charged to study procedures for the Blount trial." Resp. Br. 36 n.37. Yet despite the Senate's use of a committee in expelling Blount, and despite Jefferson's historical reference to impeachment committees, the Senate did not propose to use a committee to take evidence in Blount's impeachment trial.

Rather, the committee reviewing procedures for Blount's trial proposed "that the Senate form itself into a Court of Impeachment, by taking the oath prescribed." 8 Annals of Cong. 2196 (1798). The Senate adopted the committee's report and "formed itself into a High Court of Impeachment, *in the manner directed by the Constitution*, and the oath prescribed was administered to the Senators present." *Id.* at 2245 (emphasis added). For the Pickering impeachment in 1803 and the Chase proceeding in 1805, the Senate followed this practice and conducted the trial itself. Thus, the Senate in its earliest days -- and through all impeachment trials during the next century and a half -- believed that trial by the Senate, on the Senate floor, was "the manner directed by the Constitution."

C. Respondents' Factual Rationales For Rule XI Are Unavailing

Respondents offer two fact-based defenses for Rule XI: (i) that this Court should conclude that, based on the evidence, the Senate properly convicted Nixon, and (ii) that the Senate is too busy to spend four days hearing the evidence against Nixon. Neither rationale has any force.

Respondents assert that Nixon's own testimony "was persuasive evidence that he committed perjury." Resp. Br. 44. Because Nixon argued on his own behalf for thirty minutes, respondents add, the conviction also may be sustained. Respondents thus perversely invite this Court to review the sufficiency of the evidence against Nixon, while simultaneously arguing that Nixon's claim is non-justiciable.

Nixon's argument to the Senate was just that -- argument. He did not testify regarding the facts at issue, nor did the Senate hear from Nixon's accusers (a convicted perjurer and an admitted perjurer) regarding those facts. As the Rule XI committee concluded, proper resolution of the charges against Nixon depended on knowledge of the "specific details" of the conversations about which Nixon was alleged to have lied.[14] Closing argument is no substitute for the testimony of all witnesses, including the accusers.[15]

In addition, respondents continue to plead expediency in defense of Rule XI. They do not address, however, the Framers' clear intent that impeachment trials *not* be "consistent with a reasonable attention to economy." Respondents also make no response to this Court's admonition that considerations of "convenience and efficiency" will not save a given law or procedure "if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983). As this Court recently reaffirmed in *New York v. United States*, 60 U.S.L.W. 4603, 4615 (U.S. June 19, 1992):

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[14] *Report of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.*, S. Rep. No. 164, 101st Cong., 1st Sess. 18-19 (1989).

[15] Respondents also assert, contrary to centuries of experience, that credibility determinations can be reached without observing "witness demeanor." Resp. Br.44; *cf.* Pet. Br. 14 n.13, 18-19, 34-35 (witness demeanor critical to credibility determination). As the Chief Justice recently observed concerning the Chase impeachment trial (Rehnquist, *supra*, at 68):

> [A] mere record of questions and answers tells us nothing about what courts call the "demeanor" of the witness -- the expression on his face, his attitude, his intonation, and similar things that the senators sitting in judgment were able to view firsthand. It is the difference between reading a letter from someone and talking to the person face-to-face; the words used in the conversation may be the same as the ones used in the letter, but because one is able to see the person with whom one is conversing, the conversation may give an entirely different impression from the letter.

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

Respondents' expediency rationale not only is irrelevant, but also rings hollow. Respondents allege an "increase in legislative demands" since 1789. Resp. Br. 42. Prior Senates, however, managed to fulfill their constitutional obligation to try impeachments despite pressing legislative agendas. Pet. Br. 10 & n.4, 12.[16]

In fact, the Senate convened for only 136 days in 1989, or about 11 days per month.[17] Eight of those "working days" were pro forma sessions lasting less than a minute,[18] while two others

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[16] In contrast, 87 of the 240 public laws enacted in 1989, when both the Nixon and Hastings impeachments came before the Senate, were "commemorative" acts, *see* Stathis & Schwemle, *Commemorative Legislation* 1, 17 (Cong. Research Serv. Report, Jan. 2, 1991), including the proclamation of National Tap Dance Day, Country Music Month, and National Day to Commemorate the Bastille Day Bicentennial. 103 Stat. 148, 774, 838 (1989).

[17] 136 Cong. Rec. D1 (daily ed. Jan 23, 1990).

[18] 135 Cong. Rec. S805 (daily ed. Jan. 27, 1989) (4 seconds); *id.*, D53 (daily ed. Feb. 3, 1989)(1.06 seconds); *id.*, D86 (daily ed. Feb. 21, 1989)(1 second); *id.*, S1755 (daily ed. Feb. 27, 1989)(0.6 seconds); *id.*, S2531 (daily ed. March 13, 1989)(9.5 seconds); *id.*, S4945 (daily ed. May 5, 1989)(0.53 seconds); *id.*, S6485 (daily ed. June 12, 1989)(26 seconds); *id.*, D967 (daily ed. Sept. 8, 1989)(30 seconds).

took less than an hour.[19] The Senate in 1989 took seven recesses, each lasting between ten and 30 days.[20] Thus, although the congressional session may have extended for 301 days, as respondents contend, Resp. Br. 42 n.47, there were at least seven periods during which the Senate could have heard the four-day Nixon trial and still been able to recess for the next six days.[21]

II. PETITIONER'S CLAIM IS JUSTICIABLE

Respondents concede that *Powell*, *Montana*, and other decisions of this Court confirm the justiciability of a claim that one of the express limitations of the impeachment clause has been transgressed. The need for judicial review is heightened here because an impeachment trial directly concerns the power of Congress over the executive and judicial branches. Nevertheless, respondents offer a variety of flawed arguments against

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[19] 135 Cong. Rec. D20 (daily ed. Jan. 20, 1989) (11 minutes); *id.*, at D317 (daily ed. April 10, 1989) (48 minutes).

[20] *See* 135 Cong. Rec. S7 (daily ed. Jan. 3, 1989) (recess from January 4 until January 19, 1989); *id.*, D78 (daily ed. Feb. 9, 1989) (recess from February 10, 1989 until February 20, 1989); *id.*, D238 (daily ed. March 17, 1989)(recess from March 18 until April 3, 1989); *id.*, D378 (daily ed. April 19, 1989) (recess from April 20 until April 30, 1989); *id.*, D525 (daily ed. May 18, 1989)(recess from May 19 until May 30, 1989); *id.*, D712 (daily ed. June 23, 1989) (recess from June 24 until July 10, 1989); *id.*, D937 (daily ed. Aug. 4, 1989) (recess from August 6, 1989 until September 5, 1989).

[21] Respondents repeat their peculiar warning that, if the Senate must try impeachments, "actual attendance may be less than the attendance in committee and the composition of the group [will be] 'constantly changing.'" Resp. Br. 41 (quoting Pet. App. 51a-52a). But respondents do not contest that the quorum requirement applies to impeachment proceedings on the floor of the Senate, and thus establishes a minimum attendance requirement of a majority of members. In this regard, Amici Washington Legal Foundation, et al., erroneously contend that, in the court below, Nixon conceded the constitutionality of a trial on the Senate floor attended only by 12 senators. *See* Amici Br. 5-6. No such concession was made. *See* Transcript of Oral Argument 10 (Mar. 14, 1991).

judicial review. In this case, justiciability turns solely on whether Rule XI violates an "express limitation" of the Constitution.

A. Characterizing The Impeachment Clause As A "Grant Of Authority" Does Not Advance The Analysis

Respondents begin with the pronouncement that the Senate's "sole Power to try all Impeachments" constitutes "a grant of authority, not a limitation on its exercise." Resp. Br. 12, 17. The significance of this statement is elusive. If, as we have shown, the text requires the Senate and not a committee of twelve senators to try all impeachments, the power to try impeachments carries an inherent "limitation on its exercise."

Every constitutional "grant of authority" that designates a procedure for its exercise also serves as a "limitation on its exercise." For example, the Constitution grants legislative authority to Congress, and prescribes certain procedures for its exercise. *Chadha*, 462 U.S. at 958-59. Although there is no express prohibition against exercising that authority by other means, neither house may do so, even if an alternative route might be a "convenient shortcut" or provide relief from "governmental processes that often seem clumsy, inefficient, even unworkable." *Id.* *See Bowsher v. Synar*, 478 U.S. 714, 733-34, 736 (1986); *Buckley v. Valeo*, 424 U.S. 1, 125-35 (1976); *Powell v. McCormack*, 395 U.S. 486, 550 (1969); *see also New York v. United States*, 60 U.S.L.W. at 4611-12. Equally, the grant of "judicial power" in Article III bars the courts from exercising other powers. *Lujan v. Defenders of Wildlife*, 60 U.S.L.W. 4495, 4496-97, 4501 (U.S. June 12, 1992).

Respondents also claim reliance on the rulemaking clause in Article I, but exercise of that plenary power is subject to judicial review when Congress "ignores constitutional restraints or violate[s] fundamental rights." *United States v.*

Ballin, 144 U.S. 1, 5 (1892); *see Morgan v. United States*, 801 F.2d 445, 451 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987).

B. Respondents' Construction Of "Sole Power" Is Misguided

Respondents continue to assert that the grant to the Senate of "sole power" to try impeachments precludes judicial review. Noting that the impeachment trial clause is the only constitutional provision that confers a "sole" power, respondents contend that the phrase must be construed to "give the Senate sole power to determine the structure of the proceedings and to resolve procedural issues." Resp. Br. 17-18.

The Constitution gives the Senate the "sole Power to *try* all Impeachments," thereby excluding trial of impeachments in the courts. Yet the clause cannot be read to grant the Senate the sole power to decide whether it has complied with that clause. Article III confides that power in the courts. If "sole power" meant what respondents say, the Senate also would have exclusive authority over whether any of the other "express limitations" on the impeachment trial power were violated, such as the requirement of a two-thirds majority vote for conviction. Yet even respondents acknowledge that judicial review is available for such violations.

The absence of an express provision for judicial review of impeachments is not significant. Article III extends the judicial power to *all* cases arising under the Constitution, and the impeachment clause does not negate that provision. By contrast, when the Framers wished to prohibit presidential pardons for those convicted after impeachment trials, they unmistakably stated that prohibition in Article II, section 2, clause 1. The absence of such a prohibition in Article III demonstrates the need for judicial review here, since there is no "textually demonstrable commitment" to the Senate of constitutional impeachment issues.

Respondents have identified nothing in the debates over the Constitution or its drafting history to support their view of

justiciability. Prior drafts of the impeachment trial clause referred only to the Senate's "power" to try impeachments; no special emphasis or distinction was accorded the word "sole" when it was added to clarify that the Senate -- and not the courts -- would "try" and "convict" in impeachment "cases." Indeed, the word "sole" was added by the Committee of Style, which "'had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so.'" *Powell*, 395 U.S. at 538-39 (quoting C. Warren, The Making of the Constitution 422 n.1 (1928)).[22]

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[22] Despite respondents' suggestions to the contrary, *see* Resp. Br. 25, the Framers did not intend changes by the Committee of Style to alter the meaning of the Constitution as previously approved by the Convention. *See, e.g.*, M. Farrand, *The Framing of the Constitution* 181-83 (1913) (member of Committee of Style allegedly altered punctuation in Art. I, § 8, cl. 1 to convert general welfare clause into independent congressional power, but another delegate directed correction to conform to Convention proceedings); 2 *Records of the Federal Convention of 1787* 607 (M. Farrand ed. 1966) [hereinafter "Farrand"] ("The Report from the Committee of stile and arrangement, was taken up, in order to be compared with the articles of the plan as agreed to by the House & referred to the Committee . . . .").

The drafting of the contracts clause in Article I, section 10, does not undermine this conclusion. That provision was first offered by Rufus King on August 28, 1787. *See* 2 Farrand 439.The ensuing debate reflected agreement with the principle that the States should be barred from imposing "retrospective" restrictions on private contracts. *Id.* at 440. Instead of adopting the King proposal, however, the delegates agreed that their concerns were met by a bar against "retrospective ex post facto laws." *Id.*; *see also* 1 *1787 Drafting the U.S. Constitution* 1084 (W. Benton ed. 1986). Yet the next day John Dickinson reported that, "on examining Blackstone's Commentaries, he found that the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that *some further provision for this purpose would be requisite*." 2 Farrand 448-49 (emphasis added). The Committee of Style then substituted language based on the original Rufus King proposal, thereby effecting the intent of the Framers. *Id.* at 597. *See also* 3 Farrand 99-100 (September 1787 letter from Convention delegates Roger Sherman and Oliver Ellsworth).

C. Because Impeachment Concerns Confrontations Between Branches, The Need For Judicial Review Is Heightened

Respondents argue that the principle of separation of powers bars this Court from intruding on the Senate's conduct of its internal affairs. The holding of *Powell v. McCormack* undercuts this argument entirely. Moreover, this case does not concern only the Senate's ordering of its own affairs. Through Rule XI, the Senate has denied the constitutional rights of an individual officer of a coordinate branch. When one branch so exceeds its powers, violates an express command of the Constitution, and degrades the independence of another branch, judicial review is essential.

This Court has not shrunk from determining the constitutional limits on the powers of other branches. *See* cases cited at Pet. Br. 47. Respondents object that judicial review here would "place ultimate control over the impeachment process in the *same* body that the impeachment process was intended to regulate." Resp. Br. 27. But this supposed circularity is neither real nor a barrier to judicial review.

First, courts often review legislation affecting the institutional prerogatives of the judiciary. *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989) (judicial commission to promulgate sentencing guidelines); *Morrison v. Olson*, 487 U.S. 654 (1988) (judicial appointment of special prosecutors); *United States v. Will*, 449 U.S. 200 (1980) (judicial salaries). And, as in petitioner's case, they are routinely responsible for conducting criminal proceedings undertaken against members of the judiciary. Thus, courts are not institutionally disabled from construing the impeachment clause any more than legislative self-interest bars Congress from regulating its membership, or setting its own salaries.

Moreover, impeachment does not apply only to judges, but also applies to executive officers like President Johnson and Secretary of War Belknap. Judicial review of constitutional

issues in such executive impeachments would not present the supposed circularity that respondents decry. Yet neither the Constitution nor logic support having judicial review turn on whether the accused is a cabinet member or a judge.

Respondents also cannot explain why court review of the issue presented here would thwart the Framers' intent while review of other constitutional issues surrounding impeachments, such as the two-thirds majority requirement, would not. As in *Powell*, if a constitutional limitation has been violated here, the case is justiciable. *See Powell*, 395 U.S. at 547-50.

At bottom, respondents propose to construe the Senate's sole power to try impeachments to include the sole power to interpret the constitutional provisions that govern that power. Such an expansion exemplifies "the particular danger of the Legislative Branch's accreting to itself judicial . . . power" which the Framers feared. *Mistretta*, 488 U.S. at 382; *see The Federalist* No. 78, at 492 (A. Hamilton). This accretion is particularly threatening when the power involved enables the Senate to remove an officer of another branch and permanently disqualify him from future office. *See* Art. I, § 3, cl. 7. Judicial review must be available to ensure that such ultimate power is exercised in the manner prescribed by the Constitution.

D. This Case Presents No "Unsettling" Question of Relief

Although petitioner seeks only a declaratory judgment, respondents contend that judicial resolution of his claim lacks "finality" and may have "unsettling" consequences. Resp. Br. 28 n.27. Even if that assertion were true, it is irrelevant.[23] When courts determine constitutional rights and the boundaries of a coordinate branch's power, the consequences may be

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[23] If judgment were granted in petitioner's favor, it would be up to Congress to decide whether to impeach and retry him or to seek some other resolution of this matter. Under the Declaratory Judgment Act, this case presents no difficult remedial issues.

"unsettling" in some sense. Yet judicial review is not withheld for that reason.[24]

Petitioner does not challenge any judgment entered by the Senate or the Senate's power to try him, he challenges the Senate's attempt to avoid trying the impeachment at all. "The plenary authority of Congress . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." *Chadha*, 462 U.S. at 940-41.

CONCLUSION

For all the foregoing reasons, petitioner has a constitutional right to trial by the Senate, and this Court should determine that right. The decision below should be reversed and declaratory judgment should be entered in favor of petitioner.

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[24] For example, the Court's ruling in *Chadha* nullified nearly 200 statutory provisions dating back a half-century. *Chadha*, 462 U.S. at 944-45.